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No. 93-1692

In The

Supreme Court of the United States

October Term, 1993

COUNTY OF SAN DIEGO, AND
THE BOARD OF SUPERVISORS FOR THE
COUNTY OF SAN DIEGO,

Petitioners,

v.

JOHN MURPHY,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

I. The California No Preference Clause Has No Federal Counterpart, And The Federal Courts Should Abstain Pending Resolution Of The State Constitutional Claim By A State Court

Respondent contends that the California no preference clause relates closely to the Establishment Clause of the First Amendment. Respondent also asserts that the no preference clause has repeatedly been interpreted by California state courts. Therefore, respondent asserts that the meaning of the no preference clause is clear and that a federal court may interpret the state constitutional provision in the first instance. Opposition at 11.

In short, the thrust of respondent's contention is that there is little difference in language or interpretation between the no preference clause and the religion clauses of the First Amendment. Opposition at 12. Respondent thereby suggests that a federal court had interpretive caselaw to guide it, and that the doctrine of *Reetz v. Bozanich*, 397 U.S. 82 (1970) is not applicable. Respondent's analysis of the no preference clause is faulty. The courts below should not have attempted to interpret the clause themselves, but should have abstained and awaited interpretation of the clause by a state court.

The court of appeals reached a conclusion similar to that asserted by respondent: "The legal landscape presented here differs dramatically from that presented in

Reetz, by Alaska's unique and uninterpreted constitutional provisions regarding fishing rights. Here, we have interpretive caselaw." App. 14.

While there may be interpretive case law about the no preference clause, there is also great disagreement on the California Supreme Court about the appropriate interpretation of that clause. Moreover, the California Supreme Court has indicated that the no preference clause does not mirror the federal constitution's religion clauses but markedly departs from those clauses both in text and in interpretation. Therefore, respondent's premise fails.

One need not look far for indications that the meaning of the no preference clause is unclear. The court of appeals acknowledged the intense disagreement about that clause's meaning within the California Supreme Court. *See* App. 14, n.3. That discussion set forth the various opinions of the justices of the California Supreme Court in *Sands v. Morongo Unified School Dist.*, 53 Cal.3d 863 (1991), *cert. denied*, 112 S. Ct. 3026 (1992).

The opinions in *Morongo* stress the unique character of the no preference clause. These opinions provide a powerful argument in favor of the distinctive character of that provision and the necessity of having it interpreted first by a state court. In *Morongo*, Justice Kennard in her plurality opinion referred to the no preference clause as "having no counterpart[ ] in the federal charter." 53 Cal.3d at 883. She specifically emphasized the distinct function of the no preference clause:

> "The Attorney General of this state has observed that '[i]t would be difficult to imagine

> a more sweeping statement of the principle of governmental impartiality in the field of religion' than that found in the 'no preference' clause, and California courts have interpreted the clause as being more protective of the principle of separation than the federal guarantee."

Id. (citations omitted).

In a concurring opinion, Justice Mosk also stressed the particular and unique character of the no preference clause. "It is undisputed that provisions of the California Constitution are not dependent for their meaning on the federal Constitution." *Id.* at 907 (Mosk, J., concurring). Justice Mosk examined the text and history of the no preference clause:

> "Article I, section 4. provides, 'Free exercise and enjoyment of religion without discrimination or preference are guaranteed. . . . The Legislature shall make no law respecting an establishment of religion.' To be sure, the establishment clause of this section is virtually identical to its federal counterpart. But the free exercise clause (hereafter the preference clause) of article I, section 4, is without parallel in the federal Constitution. The Attorney General has emphasized the broad scope of the preference clause: 'It would be difficult to imagine a more sweeping statement of the principle of government impartiality in the field of religion.' [citation omitted]. Our case law has also recognized the strength of this clause, and acknowledged that in some instances it might warrant a separation of church and state more strict than that called for in the federal Constitution. As we stated in *Fox v. City of Los Angeles* (1978), 22 Cal.3d 792, 796 [150 Cal.Rptr. 867, 587 P. 2d 663], under article I,

> section 4, 'Preference thus is forbidden even where there is no discrimination. The current interpretations of the United States Constitution may not be that comprehensive.' "

Id. at 910-11. After canvassing a series of California cases construing the no preference clause, Justice Mosk concluded by pointing out its unique function: "From these decisions, we learn that the preference clause seeks to prevent government from giving *any* advantage to religion in California." *Id.* at 911 (emphasis in original).

Although both Justice Kennard in the plurality opinion for the Court in *Morongo* and Justice Mosk, concurring, suggest that the no preference clause may be more sweepingly separationist than the federal constitution's Establishment Clause, Justice Panelli reached the opposite conclusion:

> "I find nothing in the history of this provision to support the conclusion that its framers intended to create a 'wall of separation' higher than that established by the federal establishment clause. Indeed, to the extent the concept of 'separation' might counsel official toleration of illegal acts compelled by religious belief, the framers appear to have intended a somewhat lower wall.
>
> . . .
>
> "In summary, I cannot find in the 'preference or discrimination' clause an interest to erect the absolute 'wall of separation' that would justify a decision to ban religious invocations at high school graduation ceremonies. Instead, the clause appears to add only the requirement that the state not prefer, or discriminate against, a particular sect."

Id. at 933-35 (Panelli, J., dissenting).

Justice Baxter, also dissenting in *Morongo*, concluded that the no preference clause was not violated by allowing religious invocations at public high school graduation ceremonies. Justice Baxter took a view of the no preference clause which was not separationist. *Id.* at 945-46 (Baxter, J., dissenting).

The foregoing discussion of the numerous opinions in *Morongo* indicates that whether the no preference clause is sweepingly separationist – or not separationist at all – is a matter of intense dispute in the California Supreme Court. This dispute underscores the appropriateness of awaiting prior state court resolution of the issue.

Moreover, even if it were clear that the no preference clause is sweepingly separationist, abstention would still be appropriate. Abstention has been held to be appropriate even if the state constitution provides greater protection than exists under the federal constitution and even if, in such circumstances, the state provision mirrors a federal constitutional provision. *See Fields v. Rockdale County*, 785 F.2d 1558 (11th Cir.), *cert. denied*, 478 U.S. 1020 (1986). In *Rockdale*, Chief Judge Godbold concluded: "The relevant Georgia constitutional provision does mirror the language of the Fourteenth Amendment due process clause, but the Georgia decisional law . . . is a strain of substantive due process that extends protections beyond what federal due process alone affords." 785 F.2d at 1561. Accordingly, the Eleventh Circuit ordered abstention in *Rockdale*. *Id.* at 1563. Where a state constitutional provision has a distinctive mission in that state's constitutionalism, federalism requires some deference toward that mission.

Despite the sharp disagreements reflected in the opinions of the Justices of the California Supreme Court in *Morongo*, the court of appeals somewhat inexplicably concluded that "the varied viewpoints" expressed there do not necessarily indicate "an interpretive shift" nor do they undermine "prior state court opinions interpreting the No Preference Clause." App. 14 n.3. The number of votes which a particular interpretation of a state constitutional provision can command on the state supreme court is not the issue with which *Reetz* is concerned. The fundamental issue with which *Reetz* is concerned is whether the state constitutional provision has a federal constitutional counterpart or whether it is unique. Here it is evident that the no preference clause has no federal constitutional counterpart. It is equally evident that the meaning of the no preference clause is not sufficiently clear as applied to the facts of this case to make it appropriate for a federal court to interpret that clause in the first instance.

II. The Decision Of The Court Of Appeals Clearly Conflicts With *Reetz v. Bozanich*

Respondent rejects petitioners' contention that the court of appeals' decision violated *Reetz*. Both that decision and respondent take a rigidly narrow view of the *Reetz* doctrine. In their view, *Reetz* instructs a federal court to abstain and allow a state court to interpret a unique provision of state constitutional law only if that provision had not previously been interpreted by a state court. Opposition at 12. As it happened, the fishing rights provision of the Alaska state constitution at issue in *Reetz*

had not been previously interpreted by an Alaska state court.

But the failure of state courts to interpret a state constitutional provision is not the key to invoking the *Reetz* doctrine; the key is whether the state constitutional provision is unique and whether the issue of state constitutional law presented is uncertain. *Reetz*, 397 U.S. at 86. Thus, abstention is unnecessary if the state constitutional provision is the mirror image of the federal constitutional provision. *See Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971) (no abstention under federal due process claim not complicated by unresolved state law question, where plaintiffs could have sought relief under similar provision of state constitution). A contrary doctrine would have destructive consequences for the resolution of federal constitutional issues by federal courts. As an eminent scholar in the field of federal jurisdiction recently stated, "[f]ederal court abstention is required, however, when the state has a constitutional provision unlike any that exists in the United States Constitution and the state court's construction of that clause might make the federal court ruling unnecessary.". E. Chemerinsky, *Federal Jurisdiction* 694 (2d ed. 1994).

Petitioner submits that prior interpretation by the state court of the no preference clause would make resolution of the federal constitutional issue presented here unnecessary. It would also provide an opportunity for the state courts to resolve in the first instance some of the complexities and ambiguities that are clearly present under the no preference clause. "[W]here the scheme as a whole calls for clarifying interpretation by the state courts, we have regularly required the district courts to

abstain." *Harris County Comm'r Court v. Moore*, 420 U.S. 77, 84 n.8 (1975) (citing *Reetz*).

III. The *Fox* Case Is Not Dispositive

Respondent's opposition devotes considerable space to the proposition that *Fox v. City of Los Angeles*, 22 Cal.3d 792 (1978), involving the display of a cross on public property, is squarely on point and thus "provides sufficient grounds to determine with confidence how a state court would rule. . . . " Opposition at 7. However, this argument tellingly ignores those efforts which the court of appeals had to make in order to distinguish a case in which a public cross was held not to violate the no preference clause. *See Carpenter v. City & County of San Francisco*, 803 F.Supp. 337 (N.D.Cal. 1992), *appeal docketed*, No. 92-16767 (9th Cir. Oct. 29, 1992).

Although the fact pattern in *Carpenter* is similar to the facts of this case, the court of appeals attributed the different result in *Carpenter* to "the fact-based contextual inquiry required by these kinds of cases." App. 25 n.5. In *Carpenter*, the court found that *Fox* was distinguishable. *Carpenter*, 803 F.Supp. at 343. The most important factor in this finding was physical location: "the *Fox* cross was illuminated on city hall, thereby giving it the official stamp of governmental approval." *Id.* The *Carpenter* court also found that the Mount Davidson cross, "which has stood for fifty-seven years, serves as a reminder of an empirical past. . . . " *Id.*

The same is true of the Mount Helix cross. Contrary to petitioner's assertion, a reasonable observer would not

associate the Mount Helix cross with the County of San Diego. Petitioner's own experience refutes his assertion: although he lived in the area for many years, petitioner did not know the cross was situated on County land for seventeen years. This is not the case of a cross which was illuminated on city hall.

In addition, as in *Carpenter,* the Mount Helix cross serves as a reminder of an empirical past. The mere length of time it has been part of the community is sufficient to establish this. While the landmarks of San Diego may not be as universally recognizable as the Golden Gate Bridge and Coit Tower, they form the basis of San Diego's cultural heritage and as such are entitled to recognition. The Mount Helix cross is part of this heritage.

Respondent would have the *Fox* case operate as a *per se* rule precluding any cross found on government property. Yet the answer is not as simple as that, and this is why the issue of state law remains uncertain. The *Carpenter* case, and the court of appeals' attempt to distinguish it, illustrate this point precisely.

IV. Conclusion

In *Reetz*, this Court made it clear that *Pullman* abstention "should be applied only where 'the issue of state law is uncertain.' " 397 U.S. at 86 (citation omitted). Respondent submits that this is such a case. The petition for certiorari should be granted.

Respectfully submitted,

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